4. Energy Facility Siting in New Hampshire

4.1 The Energy Facility Siting Process in New Hampshire

The siting of energy facilities is a critical aspect of ensuring that New Hampshire continues to have a diverse, safe and plentiful energy supply to meet our state's future needs. However, with the increasing regionalization of the markets for electricity and natural gas infrastructure, the role of an individual state is evolving. In addition to the need to protect our state's interests and ensure adequate resources, we also need to be ready to address future siting challenges that are likely to arise from new technologies and new approaches such as co-generation and distributed generation. These diverse issues underscore the need for New Hampshire to have an effective process for the siting of energy facilities.

In recognition of the importance of siting, in 1990 the New Hampshire Legislature established a coordinated approach to the evaluation and permitting of plans for the siting, construction, operation, monitoring and enforcement of large energy facilities and high voltage transmission lines. This integrated multi-agency process for the review and permitting of energy facilities has been recognized as a successful approach to streamlining the siting process.

ECS convened a meeting in the Spring of 2002 to consider New Hampshire's siting process with a diverse group of stakeholders including regulators, members of the siting committee, applicants who have been through the process, utility representatives, and other interested parties. The consensus during the discussion was that New Hampshire's siting process has worked quite well, and with the exception of the need to finalize the siting committee's administrative rules, most did not see a need for major changes to the siting process at this time. However, it was acknowledged that the State should explore ways to review some projects that fall outside of the scope of New Hampshire's siting process, namely smaller projects such as distributed generation and renewable technologies.

The purpose of this section is to provide an overview of New Hampshire's siting statute, the siting evaluation committee, the process for an applicant, and identify potential future needs for the state's siting process.

4.2 The Statutory Framework

New Hampshire's "one-stop shopping" permitting approach to siting energy facilities is governed by the State's Energy Facility Siting Evaluation Committee (SEC). This integrated process, created by RSA 162-H, requires that the eight state agencies with jurisdiction over energy facilities sit as a joint committee to review proposed energy projects in the state. This approach provides a single forum for an applicant to present an integrated application, avoiding the duplication that might occur if separate applications had to be reviewed by each agency with jurisdiction over a portion of a proposed project.

The siting statute begins by explicitly making the important connection between energy, the environment, the state's economy, land use policy, and public health by stating:

> The legislature recognizes that the selection of sites for energy facilities will have a significant impact upon the welfare of the population, the economic growth of the state and the environment of the state. The legislature, accordingly, finds that the public interest requires that it is essential to maintain a balance between the environment and the possible need for new energy facilities in New Hampshire; that undue delay in construction of any needed facilities be avoided; and that the state ensure that the construction and operation of energy facilities is treated as a significant aspect of land use planning in which all environmental, economic and technical issues are resolved in an integrated fashion.
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> RSA 162-H:1, I.

To ensure that all possible impacts that may result from a proposed energy facility are considered in the permitting process, the SEC includes fifteen officials (or their designees) from eight state agencies:

- Commissioner of the Department of Environmental Services, Chair of SEC
- Director of the DES Water Division
- Director of the DES Air Resources Division
- The three Public Utilities Commissioners, with the Chair of the PUC as Vice Chair of SEC
- The Chief Engineer of the PUC
- Commissioner of the Department of Resources and Economic Development (DRED)
- Director of Parks and Recreation, DRED
- Director of the Division of Forests and Lands, DRED
- Commissioner of the Department of Health and Human Services
- Executive Director of the Fish and Game Department
- Director of the Office of State Planning
- Director of the Governor's Office of Energy and Community Services
- Commissioner of the Department of Transportation

The statute also includes an Assistant Attorney General as "Counsel for the Public." The Public Counsel represents the public "in seeking to protect the quality of the environment and in seeking to assure an adequate supply of energy," and is treated as a formal party. (RSA 162-H:9). The participation of Public Counsel does not prevent any member of the public from participating in the process, but SEC may require that individual persons consolidate their cases with the Public Counsel if the Committee finds that their interests are "substantially identical." The role of Public Counsel has proven to be an important one with respect to environmental issues, and public health and safety concerns.

Although the participating agencies with jurisdiction over the different aspects of a proposed project do the work of reviewing the application and developing the certificate, permits and conditions, the Committee may not delegate the authority to hold hearings, issue certificates, actually determine the terms and conditions of the certificate, or enforce a certificate (RSA 162H:4, III). However, the Committee may delegate to a specific agency or official the authority to "specify the use of any technique, methodology, practice . . . or the authority to specify minor changes in the route alignment" when new information is available. RSA 162-H:4, III-a.

The statute provides that in order to undertake the thorough review necessary for an energy facility, the Committee, along with Public Counsel, may conduct all reasonable studies and investigations as it deems appropriate to carry out the purposes of the siting process. This includes the hiring of consultants, legal counsel and other staff. The costs of undertaking these studies and hiring necessary experts and counsel must be borne by the applicant.

4.3 The Siting Process

The siting process applies only to large projects, defined as those over 30 megawatts, transmission lines over 100 kilovolts and more than 10 miles, and energy facilities such as refineries, gas plants, pipelines, and storage and unloading facilities. RSA 162-H:2.[1] However, a project that does not meet these requirements may also be brought within the SEC process if the applicant requests that SEC take jurisdiction, or if two "petition categories" as listed in RSA 162-H:2, XI make such a request. Those categories include 100 or more registered voters in a host community or abutting community, or the selectmen of those communities.

As a result of this ability to "opt-in" to the SEC process, an applicant for a project less than 30 megawatts could utilize the SEC process to preempt local jurisdiction, as well as to access the aggressive schedule that the statute requires SEC to follow.

[1] The statute originally included "bulk power supply facilities," but the following language is now in effect:
After the date when competition has been certified to exist, pursuant to RSA 38:36, in that portion of the state or in more than half of the state as whole, all proposed electric generating facilities of capacity greater than 30 megawatts shall be considered energy facilities, and shall not be considered bulk power supply facilities. RSA 162-H:5, IV(b).

The entire siting process must take place within 9 months from the time an application is accepted as complete. Upon the filing of an application, the Committee must forward the application to each state agency with jurisdiction over any aspect of the proposed project. Each agency must then conduct a preliminary review of the application to determine if it is complete. If the application is not sufficient, the Committee notifies the applicant of the deficiencies and indicates what information is needed, and the applicant has 10 days to cure the deficiencies or to file a new complete application. The Committee must decide whether or not to accept the application within 60 days of filing, defined as the date when the application was first submitted to the Committee.

If the Committee finds that "other existing statutes provide adequate protection of the objectives" of the siting statute, it may, within 60 days of the filing, exempt the application from the requirements of the statute. An exemption requires that the Committee find that:

1. Other statutes, rules or regulations meet the purposes of the siting statute;
2. It is appropriate for the application to be reviewed by agencies on the Committee, and that they may do so without the requirements of 162-H;
3. The agencies with jurisdiction over the project may meet the goals of the statute; and
4. Environmental impacts will be addressed by federal, state or local laws or rules.

RSA 162-H:4, IV.

When the Committee finds that an application is complete, it must hold at least one public hearing in the county where the facility will be located. The first hearing is held within 30 days after acceptance (90 days after filing). At this first informational hearing, the applicant must present information about the application to the SEC and the public. This hearing takes the place of any other hearing that would usually be required by such a proposed project, including those related to local land use regulation or state environmental regulations. This is a central aspect of the SEC, as it brings together the review of all aspects of the proposed project, preempting local control and providing one forum for local citizens to have input in the siting process.

With the exception of additional informational meetings, all future hearings in the application process are adversarial. These hearings may be held in Concord or in the county where the proposed project would be located, and the location is at the discretion of the Committee.

All agencies must report their progress on review of the application within five months after acceptance, including draft permit conditions and any additional information that is needed to make a final decision. It is customary during this process for an applicant to meet with the various state agencies to work through the details of each permit that is needed for the project, as the permit conditions set by the

SEC are one of the most important aspects of the application process. These conditions are developed with guidance and recommendations from the various agencies with expertise in areas such as water quality, public health, engineering, safety, and historical resources, in order to provide adequate protections for public health, natural resources, and the state's environment. Local issues are also often addressed through conditions placed upon the certificate.

Any state agency with jurisdiction over the project must submit a final decision within eight months after acceptance of the application. Finally, the SEC must decide whether to issue or deny a "certificate of site and facility" within nine months from acceptance of the application. The Committee may, during the review process, temporarily suspend the time frame discussed above if it finds that doing so is in the public interest.

The statute also provides enforcement authority for the Committee after the certificate is issued. The Committee may, at any time that it determines that any term or condition of any certificate issued is being violated, order that the violation be terminated. A recipient of such a notice has 15 days to address the violation, and if they do not, the Committee may suspend the certificate. Apart from emergencies, the Committee must provide written notice of the suspension, including the reasons, and provide an opportunity for a prompt hearing.

The Committee may also suspend a certificate if it determines that an applicant has made a "material misrepresentation" in its application, or if additional information shows that the applicant violated the statute or rules governing the project. The Committee may revoke a certificate that has been suspended after 90 days, after written notice and an opportunity for a hearing to address the issues.

4.4 Certificate Requirements (Findings)

The certificate issued by the SEC, after the review process outlined above, authorizes the applicant to proceed with the planned facility. The certificate is considered a final action of the Committee, and is subject only to judicial review. The Committee must find that the proposed site and facility:

1. Will not interfere with the orderly development of the region with due consideration given to the views of municipal and regional planning commissions and municipal governing bodies;
2. Will not have an unreasonable adverse effect on aesthetics, historic sites, air and water quality, the natural environment, and public health and safety;
3. That operation is consistent with the state energy policy established in RSA 378:37; and
4. That the applicant has the adequate financial, technical, and managerial capability to assure construction and operation of the facility in continuing compliance with the terms and conditions of the certificate.

RSA 162-H:16, IV.

A majority of the Committee must make these findings based upon the record in the case. In addition to these findings, the terms and conditions placed upon the certificate are another important aspect of the siting process. Those terms and conditions can include a broad array of issues, including those under the jurisdiction of any state or federal agency involved in the project, and any "such reasonable terms and conditions as the committee deems necessary and may provide for such reasonable monitoring procedures as may be necessary." RSA 162-H:16, VI.

4.5 Certificate Terms and Conditions

The broad and often overlapping expertise of the state agencies that make up the SEC brings a wealth of resources to the Committee's decisionmaking process. Those areas of agency jurisdiction and expertise include wetlands, energy policy, safety, historic preservation, state lands, transportation, and public health. From a practical perspective, although it is the Committee as whole that issues the terms and conditions that accompany a certificate, it is the agencies themselves that draft those terms and conditions and make recommendations to the Committee.

Once a proposal is submitted to the SEC, the Committee forwards a copy of an application to each state agency with jurisdiction over a proposed project. This includes any state agency with jurisdiction over the project under any state or federal law. Each agency must conduct a preliminary review to determine if the application is complete for its purposes, and if it determines that the application is not complete, the agency must notify the Committee and specify what additional information is necessary RSA 162-H:7, IV. This communication with the Committee should take place during the first 60 days after filing so that the Committee can make its determination on completeness of the application.

Once the application is deemed complete and is accepted by the Committee, the agencies focus on reviewing the application, conducting site visits if necessary, and drafting the necessary permits and conditions for the certificate. Each agency must report its progress to the Committee within five months of the acceptance of the application, including draft permit conditions and any additional information that is needed, according to RSA 162-H:6, V. All agencies having jurisdiction over the project must submit final decisions on the pertinent parts of the application to the full Committee no later than eight months after acceptance, as required by RSA 162-H:6, VI.

The SEC statute makes clear that the Committee may delegate its authority to set specific terms and conditions to the state agencies or officials who are represented on the Committee. This delegation of authority allows the agency with jurisdiction over a particular part of a proposed project to "specify the use of any technique, methodology, practice or procedure," or to require minor changes in route alignment of a transmission line or pipeline. RSA 162-H:4, III-a. Any such requirements must be approved by the full Committee.

4.6 The Siting Application Requirements

An application for a certificate of site and facility must be submitted to the Chairman of the SEC. The application must include sufficient information for the Committee to make the findings required in RSA 162-H:16, IV discussed above. An application must include completed applications for each individual agency with jurisdiction over any aspect of the project, and must, according to RSA 162-H:7, V, provide the following information:

- Details on the type and size of each major part of the proposed facility;
- The preferred site and any other potential sites for each major part of the proposed facility;
- All impacts of the proposed facility on the environment;
- Proposals for studying and resolving environmental problems associated with the project;
- The applicant's financial, technical, and managerial capability for construction and operation;
- Documentation that written notification, including copies of the application, have been provided to the governing bodies of each community in which the facility would be located; and
- Any additional information needed for the Committee to fulfill the purposes of the siting statute.

Previous applications are on file with the Department of Environmental Services, and may be consulted by applicants for guidance with format.

4.7 Siting Evaluation Committee Administrative Rules

In addition to providing the information required by the statute in an application, an applicant must also consult the SEC's administrative rules. The Committee currently operates under draft rules, and is expected to promulgate final rules in 2003.

4.8 Non-jurisdictional Energy Facilities

Projects that do not fall within SEC's jurisdiction may opt in under the statute, or must comply with applicable local ordinance and state environmental statutes and rules. As discussed below in Chapter 8, siting of new sources such as wind, solar, and ocean-based generation face potential siting challenges due to siting in remote locations. The SEC, working with Energy Planning Advisory Board proposed earlier, should begin a process to consider how best to address the unique issues presented in the siting of new energy resources such as renewables, co-generation, and distributed generation.

4.9 The Impact of Regional Issues on Energy Facility Siting

As discussed in Chapter 5, siting is often a regional issue, and facilities sited in New Hampshire do not necessarily power our state's homes and businesses. In addition, the Base Case forecast, set forth in Chapter 3, projects that New England will not see significant increased siting until approximately 2017. As a result, most activity in siting energy facilities over the next ten years is likely to deal with renewable energy, distributed generation, and other alternative forms of energy production.

In an effort to address the siting challenges that currently exist on a multi-state and regional level, the National Governors' Association (NGA) has proposed that Governors form a Multi-State Entities (MSE) committee to coordinate transmission planning, certification and siting at the regional level. An MSE would be established by a memorandum of understanding, and governed by established by-laws. The proposed MSE would not overrule state authority, nor would it advocate federal preemption of state siting authority. However, it would ensure that regional and state needs are addressed in transmission planning, rather than leave all planning to regional transmission organizations (RTOs). This regional transmission planning would also include the review of alternatives to new transmission lines, such as energy efficiency and load response programs. The MSE would also recognize that siting and certification processes need to assure a timely resolution for all parties. If adopted, an MSE would adopt a set of best practices for member states and integrate into an Interstate Protocol.[2]

Many of these regional efforts deal with the siting of transmission and distribution resources, which in New Hampshire are often under the PUC's jurisdiction, rather than the SEC's. One major issue regionally is how to recover the costs of new transmission, particularly with the emerging wholesale electricity markets trading across the region. How these costs are assigned among states in our region is a complex matter, especially when the beneficiaries of investments are limited to a load pocket or congestion area. The National Association of Regulatory Utility Commissioners has taken the position that the FERC should establish a pricing policy that determines whether the costs of a transmission expansion or upgrade are the responsibility of the "cost-causer" if the project is not within the public interest of the region as a whole. However, many parties including state regulators and FERC are reviewing alternative approaches.

One approach under consideration is Locational Marginal Pricing (LMP). LMP allows market participants to determine where transmission upgrades or new lines will reduce costs that are rising due to congestion. Upgrades or new lines would be the responsibility of the companies that hold financial transmission rights (FTRs) that they could retain for their own use or sell to other market participants.

[2] See the "*Interstate Strategies for Transmission Planning and Expansion*," a report of the National Governors Association's Task Force on Electricity Infastructure (www.nga.org).

These and other issues under discussion at the regional level underscore the need for New Hampshire to provide resources to the PUC and other agencies to adequately represent the state in these important discussions.

4.10 Recommendations for Improving the Siting Process

In sum, New Hampshire's integrated approach of bringing together several state agencies with overlapping jurisdiction to review energy siting applications has worked well. However, the state needs to address how to approach projects that are not within SEC's jurisdiction, including smaller projects, renewables, co-generation, and distributed generation. The SEC, working with Energy Planning Advisory Board proposed earlier, should convene discussions with stakeholders to consider how to address the unique issues presented in the siting of new energy resources that are not typically within the jurisdiction of the Committee.

The SEC should also work to strengthen ties to the State's efforts to represent our interests at the regional and national level, perhaps by working with the PUC and the proposed Energy Planning Advisory Board to ensure that the State has the appropriate resources to participate regionally. The SEC should ensure that any regional siting committees, such as the NGA proposal discussed above, take into consideration the Committee's work. Similarly, the SEC should work to ensure that regional issues and planning are considered by the Committee in its deliberations on proposed projects.

The SEC will be undertaking a rulemaking process in 2003, which provides an opportunity to address any issues with the process.